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SERVICE DATE – JULY 1, 2016

## SURFACE TRANSPORTATION BOARD

### DECISION

Docket No. AB 167 (Sub-No. 1189X)

CONSOLIDATED RAIL CORPORATION—ABANDONMENT EXEMPTION—IN HUDSON  
COUNTY, NJ

Docket No. AB 55 (Sub-No. 686X)

CSX TRANSPORTATION, INC.—DISCONTINUANCE OF SERVICE EXEMPTION—IN  
HUDSON COUNTY, NJ

Docket No. AB 290 (Sub-No. 306X)

NORFOLK SOUTHERN RAILWAY COMPANY—DISCONTINUANCE OF SERVICE  
EXEMPTION—IN HUDSON COUNTY, NJ

Digest:<sup>1</sup> This decision: (1) grants in part, and denies in part, a motion filed by a group of limited liability companies (LLCs) to compel compliance with a Board order served on November 2, 2015; and (2) grants a motion filed by the LLCs to file a reply to a reply.

Decided: June 29, 2016

### BACKGROUND

This proceeding involves requests by Consolidated Rail Corporation (Conrail) to abandon an approximately 1.36-mile portion of a line of railroad, known as the Harsimus Branch, located in the City of Jersey City, N.J.<sup>2</sup> On December 23, 2014, the City filed a motion to compel valuation information from Conrail. (City Mot. to Compel Conrail Immediately to Supply

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> Consol. Rail Corp.—Aban. Exemption—in Hudson Cty., N.J., AB 167 (Sub-No. 1189X); CSX Transp., Inc.—Discontinuance of Serv. Exemption—in Hudson Cty., N.J., AB 55 (Sub-No. 686X); Norfolk S. Ry.—Discontinuance of Serv. Exemption—in Hudson Cty., N.J., AB 290 (Sub-No. 306X) (STB served Mar. 18, 2009). Collectively, these three dockets are referred to in this decision as Harsimus Abandonment Proceeding.

Valuation Information Required Pursuant to 49 C.F.R. § 1152.27(a) (City Mot. to Compel) at 2, Dec. 23, 2014.) Attached to the City's motion as Exhibit D was a statement from an entity that the City alleges is a prospective shipper, asserting that this entity is in need of rail service. The City designated the entire statement as highly confidential pursuant to the September 24, 2014 Protective Order in this proceeding and filed it under seal. On March 18, 2015, a group of LLCs who have intervened in this proceeding<sup>3</sup> filed a motion asking that the Board unseal Exhibit D because it did not qualify as confidential or highly confidential under the Board's protective order. In a decision served on November 2, 2015 (November 2015 Decision), the Board granted in part and denied in part the LLCs' motion. Harsimus Abandonment Proceeding, AB 167 (Sub-No. 1189X), et al. (STB served Nov. 2, 2015). The Board found that Exhibit D did not qualify as highly confidential under the protective order, but that portions of it could be classified as confidential. As a result, the Board required the City to provide an "unredacted confidential version and a public version of the exhibit, redacting from the public version only those portions of the shipper statement that qualify as confidential in accordance with this decision" and set a deadline of November 12, 2015. Nov. 2015 Decision, slip op. at 5.

On November 3, 2015, the City filed a request for clarification, indicating that CNJ Railroad (CNJ), not the City, had prepared Exhibit D and had classified it as highly confidential and that, as a result, CNJ should submit the revised versions of Exhibit D. (See generally City Req. for Clarification, Nov. 3, 2015.) The City asked in the alternative that the LLCs, as the parties moving for reclassification, should be ordered to prepare the public redacted version of Exhibit D and also represented that CNJ supported the requests made in its motion. (Id. at 2.) Neither the City nor CNJ requested an extension of the November 12, 2015 deadline. On November 10, 2015, the Board's Director of the Office of Proceedings issued an order granting the City's request, clarifying that "CNJ is responsible for producing the unredacted, confidential version and a public version of Exhibit D in accordance with the Board's November 2, 2015 decision," and reiterating the November 12, 2015 deadline for filing revised versions of Exhibit D. Harsimus Abandonment Proceeding, AB 167 (Sub-No. 1189X), et al. (STB served Nov. 10, 2015).

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<sup>3</sup> The LLCs are described as: 212 Marin Boulevard, LLC; 247 Manila Avenue, LLC; 280 Erie Street, LLC; 317 Jersey Avenue, LLC; 354 Cole Street, LLC; 389 Monmouth Street, LLC; 415 Brunswick Street, LLC; 446 Newark Avenue, LLC; and NZ Funding, LLC. The LLCs have an ownership interest in a set of properties along the Harsimus Branch.

When no revised filing was made by the City or CNJ, the LLCs filed a motion to compel compliance with the November 2015 Decision. (See generally LLC Mot. to Compel,<sup>4</sup> Nov. 17, 2015.) On December 1, 2015, the City filed a response asserting that it was not responsible for filing the confidential and public versions of Exhibit D. (See generally City Reply to LLC Mot. to Compel, Dec. 1, 2015.) On December 9, 2015, CNJ submitted a proposed public version of Exhibit D with redactions and asked that the Board deny the LLCs' Motion to Compel as moot. (See generally CNJ Reply to LLC Mot. to Compel, Dec. 9, 2015.)

On December 22, 2015, the LLCs filed a motion seeking to file a reply to CNJ's reply and submitted their own proposed redactions of the public version of Exhibit D. (See generally LLC Mot. to File a Reply to a Reply, Dec. 22, 2015.) The LLCs argued that the proposed public version submitted by CNJ had information redacted that was not properly classified as confidential. The LLCs therefore submitted their own proposed confidential version of Exhibit D, with what they argue are proper redactions.<sup>5</sup> The City opposed the LLCs' motion to file a reply to a reply on January 11, 2016. (See generally City Reply to LLC Mot. to File a Reply, Jan. 11, 2016.)

## DISCUSSION AND CONCLUSIONS

The LLCs' Motion to Compel. The LLCs assert that both the City and CNJ are in violation of the Board's November 2015 Decision because CNJ did not file the required revised versions of Exhibit D by the Board's deadline and, despite the November 10 order permitting CNJ to make those filings, the City was the party initially ordered to provide the revised versions and the party that subsequently represented that CNJ supported the City's request that CNJ be the filing party.

The City replies that the LLCs' motion is merely part of a pattern of vexatious litigation. CNJ, in its reply, apologizes for the delay in filing the redacted Exhibit D but notes that it included a redacted version in its December 9 filing.

The Board's November 2015 Decision stated:

Exhibit D does not appear to contain shipper-specific rate or cost data or other competitively sensitive information that would justify labeling this entire document highly confidential. However, certain information in the shipper statement could be considered proprietary and confidential. Specifically, the City

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<sup>4</sup> The document filed by the LLCs was submitted in the form of a letter and contained the subject line "STB Docket No. 167-1189-X and Related Dockets; Non-Compliance with Board Order." In it, the LLCs state, "[w]e hereby request that appropriate action be taken to address the City's and CNJ Rail's failure to comply with the Board's directives . . . ." Thus, we will refer to this document as the LLCs' Motion to Compel.

<sup>5</sup> The LLCs submitted this proposed confidential version under seal.

arguably could treat as confidential the information in the shipper statement regarding the financial backing of the shipper, the shipper's projected production output, the identities of the shipper's suppliers and customers, carload projections, and origin and destination pairs. However, this is the only information in the shipper statement that could potentially qualify as confidential under the Protective Order, based on the information currently before the Board.

Nov. 2015 Decision, slip op. at 5. The redacted version of Exhibit D submitted by CNJ disregards these explicit Board findings and includes redactions far in excess of those permitted under the November 2015 Decision and the protective order. The proposed redacted Exhibit D submitted by the LLCs in their December 22 filing, however, complies with the Board's orders.<sup>6</sup> We will, accordingly, adopt the LLCs' redacted version of Exhibit D for the public record in this proceeding.<sup>7</sup> As the LLCs filed their proposed redacted version with language struck out instead of redacted, they will have until July 8, 2016 to file a public, redacted version in accord with their proposed version filed on December 22, 2015. The Board will also reclassify the unredacted version of Exhibit D currently in the record as confidential.

It is ordered:

1. The LLCs' Motion to Compel is granted in part, and denied in part. The LLCs must file a public, redacted version of Exhibit D in accord with their December 22, 2015 proposed redactions by July 8, 2016.

2. The unredacted version of Exhibit D filed December 23, 2014, is reclassified as confidential.

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<sup>6</sup> The Board notes that, in addition to the items enumerated in the November 2015 Decision, the alleged prospective shipper's name should also normally be redacted, as that is information that is considered confidential. CNJ, however, has placed this entity's name into the public record in this proceeding. Thus, as the party claiming confidentiality, CNJ has arguably waived a claim here that the entity's name is confidential and, even if it has not, the question of whether the name should be redacted is moot at this point.

<sup>7</sup> On December 22, 2015, the LLCs filed a motion seeking leave to file a reply to the City's December 1, 2015 letter and CNJ's December 9, 2015 filing, both of which were, at least in part, replies to the LLCs' Motion to Compel. The LLCs simultaneously filed their proposed reply and their proposed redacted version of Exhibit D. Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. However, in the interest of a more complete record, and because the proceeding will not be further delayed by the filings, the LLCs' December 22, 2015 filings will be accepted into the record.

3. The LLCs' Motion to file a Reply to a Reply is granted.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.